

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Charles Dipasquale,

Plaintiff,

v.

Case No. 3:16-cv-219
Judge Thomas M. Rose
Mag. Judge Michael J. Newman

Detective James Hawkins, et al,

Defendants.

DECISION AND ORDER ADOPTING REPORT AND RECOMMENDATION (ECF 121) THAT: (1) PLAINTIFFS MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS (ECF 99) BE DENIED; AND (2) DEFENDANT HERRES'S MOTION FOR JUDGMENT ON THE PLEADINGS (ECF 103) ALSO BE DENIED; DENYING WITHOUT PREJUDICE TO REFILE MOTION TO AMEND/CORRECT COMPLAINT BY PLAINTIFF CHARLES DIPASQUALE, (ECF 122); AND GRANTING DEFENDANT MARK HERRES'S MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR SUMMARY JUDGMENT. (ECF 129).

Pending before the Court is a Report and Recommendation of United States Magistrate Judge Michael J. Newman, (ECF 121), that recommends that the Court deny motions for judgment on the pleadings by Defendant Mark Herres (ECF 103) and by Plaintiff Charles Dipasquale. (ECF 99).

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court has made a *de novo* review of the record in this case. Upon said review, the Court finds that the Report and Recommendation is correct. Wherefore, the Court **ADOPTS** Report and Recommendations of United States Magistrate Judge Michael J. Newman, (ECF 121), and

DENIES Plaintiff's Motion for Partial Judgment on the Pleadings, (ECF 99), and **DENIES** Defendant Herres's Motion for Judgment on the Pleadings (ECF 103).

Also pending before the Court is Motion to Amend/Correct Complaint by Plaintiff Charles Dipasquale. (ECF 122). Therein, Plaintiff requests permission "to add facts learned in discovery."

Federal Rule of Civil Procedure 15(a) governs the requested permission to amend pleadings:

A party may amend the party's pleadings ... only by leave of court or by written consent of the adverse party; and *leave of court shall be freely given when justice so requires.*

Fed. R. Civ. P. 15(a) (emphasis added). In evaluating when the interests of justice require leave to amend a pleading, courts consider several factors, including "undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Coe v. Bell*, 161 F.3d 320, 341 (6th Cir. 1998) (quoting *Brooks v. Celeste*, 39 F.3d 125, 130 (6th Cir. 1994)). A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss. *Thiokol Corp. v. Department of Treasury, State of Michigan, Revenue Div.*, 987 F.2d 376, 382-83 (6th Cir. 1993); *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000).

However, "[a] motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of the proposed amendment." *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999) (citing *Wisdom v. First Midwest Bank*, 167 F.3d 402, 409 (8th Cir. 1999); see also *Mulholland v. Pharmacia & Upjohn, Inc.*, No. 4:99-CV-98, 2001 WL 311241, at *9 (W.D. Mich. Feb. 15, 2001), *aff'd*, 52 F. App'x 641 (6th Cir. 2002) ("The district court correctly noted that a plaintiff has the opportunity to amend his complaint by means of filing a motion for leave

to amend, setting forth the substance of the proposed amendment.” 52 F. App'x 641, 648 (6th Cir. 2002). Defendants being without a basis to oppose or agree to Plaintiff's request, and the Court being in no position to rule upon it, the motion to amend, (ECF 122), is **DENIED WITHOUT PREJUDICE TO REFILING**.

Finally, Defendant requests that he have until 30 days after this Court's decision on Plaintiff's Motion for Leave to File a Second Amended Complaint to file a motion for summary judgment. (ECF 129). This motion is **GRANTED**.

Plaintiff is **GRANTED** until November 11, 2019 to file a renewed motion to amend his complaint, with the proposed amendment attached as an exhibit. Defendant is **ORDERED** to file any opposition to Plaintiff's motion by November 21, 2019. Any reply in support of the motion is to be filed by November 27, 2019. The parties are **GRANTED** until December 21, 2019 to file any motions for summary judgment.

DONE and **ORDERED** this Monday, October 21, 2019.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE